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IN THE

Supreme Court of the United States

October Term, 1959

No. 202.

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petitioner's Reply to Memorandum for the United States Suggesting Mootness.

JOSEPH K. HERTOGS,
580 Washington Street,
San Francisco, California,
Attorney for Petitioner.

WILLIAM B. BEIRNE,
G. VERNON BRUMBAUGH,
408 South Spring Street,
Los Angeles 13, California,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

SUBJECT INDEX

PAGE

Petitioner's Reply to Memorandum for the United States Suggesting Mootness 1

Appendices:

Appendix "A." Minute Order, Dated May 11, 1959..... App. p. 1

Appendix "B." Order to Show Cause in re Contempt..... App. p. 3

Appendix "C." Minute Order, Dated May 22, 1959..... App. p. 12

Appendix "D." Minute Order, Dated May 29, 1959..... App. p. 14

Appendix "E." Letter Dated July 27, 1959, Concerning Grand Jury Appearance..... App. p. 17

TABLE OF AUTHORITIES CITED

CASE PAGE

Edgerly v. Kennelly, 215 F. 2d 420..... 5

STATUTE

United States Code, Title 28, Sec. 2241..... 4, 5

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FRANK DESIMONE,

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Petitioner's Reply to Memorandum for the United States Suggesting Mootness.

I.

The Government contends that the question in issue in this proceeding is moot, because, as they say, the writ of habeas corpus *ad testificandum* under which petitioner was brought to Los Angeles to testify before a special grand jury in the Southern District of California was discharged and petitioner was returned to the Federal Detention Headquarters in New York, whence petitioner had been brought pursuant to said writ.

We have two answers to this contention:

A: The writ was not discharged; and,

B: There are now two matters pending before the District Court for the Southern District of California, both arising out of petitioner's presence in that Court's territorial jurisdiction pursuant to the command of the said writ:

1. An order of said District Court requiring petitioner to appear and be sworn before said special grand jury. (Appendices "A" and "D".)
2. A hearing on an order to show cause why petitioner should not be punished for contempt for refusing to appear and to be sworn before said special grand jury pursuant to the command of said writ and to the order of said District Court. (Appendices "B," "C" and "D.")

On May 11, 1959 the mandate from the Court of Appeals for the Ninth Circuit was filed in said District Court and petitioner was ordered to appear before said special grand jury on May 12, 1959. (Appendix "A.") On May 19, 1959, said District Court, upon application of the United States Attorney, issued an order to show cause why petitioner should not be adjudged in contempt for refusing to be sworn before said special grand jury on May 12, 1959, as ordered by said court. (Appendix "B.") Hearing on said matter was set for May 22, 1959. (Appendix "B.") On that date, May 22nd, the court continued the matter to May 29, 1959. (Appendix "C.") On May 29th, the hearing was had, and the Court ordered the petitioner to appear and be sworn before said special grand jury on July 30, 1959 at 9:30 A.M., and ordered the contempt matter held in abeyance until petitioner had so appeared and been sworn before said special grand jury. (Appendix "D.") Just prior to said May 29th, petitioner was arraigned in the District Court for the Southern District of California, upon an indictment returned in the United States District Court for the Southern District of New York, and a removal hearing on said

indictment was set for June 2, 1959 before the United States Commissioner for the District Court in Los Angeles, California. On the evening of June 1, 1959, without notice to the petitioner or to his attorneys, and without any order of court so far as can be ascertained from the record, petitioner was taken from the county jail in Los Angeles, California and returned by plane to New York where he was imprisoned in the Federal Detention Headquarters there; and this despite the fact that the removal hearing on the New York indictment was set for the next morning, June 2, 1959. The petitioner having been taken back to New York, as aforesaid, no removal hearing was had.

The writ of habeas corpus *ad testificandum* was never discharged, by order of the court, or otherwise. The writ had ordered the petitioner produced to testify before the special grand jury sitting in Los Angeles, and to be returned to New York upon the completion of his testimony. However, the matter for which he had been produced in California, viz., to testify before the special grand jury, had not been completed; to the contrary, at the time petitioner was taken back to New York, as above set forth, there was pending an order of the court that petitioner appear before said special grand jury on July 30, 1959. (Appendix "D.")

As we have pointed out above, the hearing on the order to show cause why petitioner should not be punished for contempt for refusing to be sworn before the special grand jury was had on May 29th, and at that time petitioner was ordered to appear and be sworn before said special grand jury on July 30, 1959, and the contempt matter was ordered held in abeyance until petitioner had so appeared and been sworn. (Appendix "D.") Just prior

to said July 30th, and on July 27, 1959, the Special Assistant to the Attorney General in charge of this matter addressed and caused to be sent to petitioner's counsel a letter concerning petitioner's grand jury appearance, in which he advised that it would not be necessary for the petitioner to appear before said special grand jury on July 30, 1959 as theretofore ordered by District Judge Harry C. Westover, and that "when it became feasible, a new time will be set for DeSimone's appearance in accordance with the order referred to above and you will be so advised. (Appendix "E") We find, then, that at the present time there is still pending the court's order that petitioner appear and be sworn before said special grand jury, and also, there is still pending the contempt proceeding which was ordered held in abeyance pending petitioner's appearance before and his being sworn before said grand jury, both of which matters arise out of the writ of habeas corpus *ad testificandum*, which petitioner claims the said District Court was without power to issue and which claim is the basis of petitioner's petition herein.

II.

The Government also contends that the District Court for the Southern District of California had power to issue the writ in question, and endeavors to make a distinction between the writ of habeas corpus *ad testificandum* and the writ of habeas corpus *ad subjiciendum*. We have no quarrel with the distinction between the various writs of habeas corpus, as pointed out in the cases cited by the Government. Concededly, each of the writs is for a different purpose or object. However, the power to grant the writ is governed by Section 2241 of 28 U. S. C.; and, as pointed out in our petition, this Court has held that the term "within their respective jurisdictions," as that

phrase is used in said section 2241, limits the district courts' powers to issue the writ to the territorial jurisdictions of those courts, unless specific exceptions have been created by Congress. Congress has created no exceptions to the powers of said district courts in this respect.

We note that the Government has neither mentioned nor discussed the cases cited by petitioner in his petition (other than *Ahrens v. Clark*), and particularly the case of *Edgerly v. Kennelly*, 215 F. 2d 420 (C. A. 7), which is directly in point here and in which it was held that the District Court in Illinois was without jurisdiction to issue a writ of habeas corpus *ad testificandum* directed to the Warden of the prison at Alcatraz to produce a prisoner confined in that institution, to give testimony in court in Chicago, Illinois.

Conclusion.

We submit that the writ of habeas corpus *ad testificandum* was not discharged; that the question in issue raised by the petition is not moot; and, that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH K. HERTOGS,
Attorney for Petitioner.

WILLIAM B. BEIRNE,
G. VERNON BRUMBAUGH,
Of Counsel.

APPENDIX "A."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

U. S. A.
vs.
John Doe
(witness Frank DeSimone)

No. Misc. 297 Civil
MINUTES OF THE COURT
Date: May 11, 1959,
At: Los Angeles, Calif.

PRESENT: Hon. HARRY C. WESTOVER District Judge; Deputy Clerk E. J. Fisher; Reporter: S. J. Trainor
Counsel for Plaintiff Lloyd F. Dunn, Assistant U. S. Attorney

Counsel for Defendant no appearance

PROCEEDINGS: For (1) filing and spreading Mandate of U. S. Court of Appeals, dismissing the appeal; (2) hearing motion of plaintiff, filed April 30, 1959, for an order setting aside its order staying execution as to Frank DeSimone.

Attorney Dunn moves to have said mandate spread.

Court orders that said mandate be filed and spread upon the records of this court.

Court orders that motion of plaintiff, filed April 30, 1959, for an order setting aside its order staying execution as to Frank DeSimone, is granted.

All witnesses are ordered to appear before the Grand Jury May 12, 1959, 9:30 AM.

(SEAL)

I hereby certify on Sep 2 1958 that the foregoing is a full and true copy of the original on file with this Court.

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By /s/ L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

JOHN A. CHILDRESS, *Clerk,*
By /s/ E. J. FISHER,
E. J. FISHER, *Deputy Clerk.*

HW-5/11/59.

APPENDIX "B."

LAUGHLIN E. WATERS
United States Attorney
LLOYD F. DUNN
Special Assistant to the Attorney General
762 Federal Building
Los Angeles 12, California
Telephone: MAdison 5-7411, Ext. 303
Attorneys for United States of America.

United States District Court, for the Southern District of California, Central Division.

United States of America, Plaintiff v. Frank DeSimone, Defendant.

Filed May 19, 1959, By M. E. Thompson, Deputy Clerk.

Misc. No. 297.

ORDER TO SHOW CAUSE IN RE CONTEMPT.

Upon the annexed affidavit of Lloyd F. Dunn, Special Assistant to the Attorney General of the United States, duly verified the 14th day of May, 1959, it is hereby

ORDERED that FRANK DESIMONE show cause before this court on the 22nd day of May, 1959, at 10:00 o'clock in the forenoon of that day, in Courtroom No. 5, United States Courthouse and Post Office Building, 312 North Spring Street, Los Angeles, California, or as soon thereafter as this matter may be heard, why he should not be adjudged and held in contempt of court and punished for such contempt of this court by reason of the fact that he wilfully and contemptuously disobeyed the order of the aforesaid court before the Honorable Harry C. Westover, United States District Judge, commanding respondent to

appear and testify before a duly constituted federal grand jury at 9:30 A.M. on May 12, 1959.

Dated: 5/19/59

/s/ .....
United States District Judge

Prepared by:

Lloyd F. Dunn
Special Assistant to the Attorney General

LFD:lmf

(SEAL)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By /s/ L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

LAUGHLIN E. WATERS
United States Attorney
LLOYD F. DUNN
Special Assistant to the Attorney General
762 Federal Building
Los Angeles 12, California
Telephone: MAdison 5-7411, Ext. 303
Attorneys for United States of America.

United States District Court for the Southern District of California, Central Division.

United States of America, Plaintiff v. Frank DeSimone, Defendant.

Misc. No.

AFFIDAVIT.

LLOYD F. DUNN, Special Assistant to the Attorney General of the United States, being duly sworn, deposes and says:

1) Deponent is a duly appointed Special Assistant to the Attorney General of the United States charged with the duties, responsibilities and authority to investigate and prosecute possible violations of Federal criminal law.

2) On January 9, 1959, upon the request of the United States Attorney for the Southern District of California, a special grand jury was duly empaneled.

3) This special grand jury initiated an investigation into organized crime and racketeering in this District.

4) In the course of this investigation, information came to the attention of the special grand jury indicating the necessity and desirability of having Frank DeSimone, an attorney duly authorized to practice law in the State

of California and in this Court, and whose offices have been located in the Southern District of California, appear and testify.

(SEAL)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By /s/ L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

LFD:CAL:
Lmf

5) Frank DeSimone was at that time incarcerated at the Federal Detention Center in New York City, New York, in the custody of the Attorney General of the United States.

6) The United States District Court, Southern District of California, upon application of the United States of America issued a writ of habeas corpus ad testificandum commanding the warden of said prison to produce the person of Frank DeSimone before the special grand jury in the Southern District of California on March 24, 1959.

7) Frank DeSimone was transported and did arrive in the City of Los Angeles, California, on March 12, 1959, and on direction of the special grand jury was brought before that body on March 17, 1959.

8) When he appeared before the special grand jury on March 17, 1959, Frank DeSimone refused to take the

oath tendered by the grand jury foreman alleging that he had not had sufficient opportunity to consult with his attorneys.

9) At that time his request for an opportunity to consult with his attorneys was granted and the United States Marshal was instructed to permit Frank DeSimone to consult his attorneys before he was returned to the Los Angeles County Jail, and also, if necessary, afford him the opportunity to contact his attorneys from the Los Angeles County Jail where he was maintained in custody.

10) Upon direction of the foreman of the grand jury, the witness was returned the following morning, March 18, 1959, at 9:30 A.M. at which time he again refused to take the oath on the ground that he still had not had sufficient time to consult with his attorneys and further that the writ of habeas corpus ad testificandum was subject to legal objections which he had not had the opportunity to interpose. His request for additional time was again granted and he was directed by the foreman of the special grand jury to return on March 24, 1959, at 9:30 A.M.

11) On March 23, 1959, a motion was filed with this Honorable Court by Frank DeSimone through his attorneys G. Vernon Brumbaugh and William B. Beirne to quash the writ of habeas corpus ad testificandum which motion was argued before the Honorable Harry C. Westover, United States District Judge, Southern District of California, on March 24, 1959. This motion was denied on April 3, 1959, and the witness was ordered to appear before the special grand jury on April 9, 1959; however, a motion to stay the execution of this order pending appeal was granted.

12) A notice of appeal was filed by the witness through his attorneys on April 8, 1959, and a motion to dismiss this appeal was filed by the United States of America on April 15, 1959.

13) Arguments on the motion to dismiss the appeal were heard by the Ninth Circuit Court of Appeals on April 27, 1959, and the appeal was dismissed as frivolous by the Circuit Court on April 29, 1959.

14) Motions to spread the mandate of the Circuit Court of Appeals and to set aside the staying order of the District Court, for the Southern District of California were made by the United States of America on May 11, 1959, due notice having been given, and were then granted by the Honorable Harry C. Westover, who further ordered Frank DeSimone to appear as a witness before the special grand jury at 9:30 A.M. on May 12, 1959.

15) On May 11, 1959, at the time of the motions referred to in the next preceding paragraph, the witness Frank DeSimone was not represented by counsel in the courtroom; however, upon leaving the courtroom the witness's attorney, William B. Beirne, was observed by the deponent, by Charles A. Lynberg, Special Attorney, United States Department of Justice, and by newspaper reporters Charles Neisswender and William J. Burns. At that time attorney William B. Beirne expressed surprise that the proceedings had been completed and further stated that he had been outside the courtroom for a considerable period of time.

16) Attorney for the witness Frank DeSimone, William B. Beirne, appeared in the offices of deponent on May 12, 1959, at 9:10 A.M. and appealed to the courtesies of deponent as a fellow attorney requesting that the

witness again be excused from appearing before the grand jury on that date, stating his intention to appeal from the decision of the Ninth Circuit Court of Appeals to the United States Supreme Court. Deponent denied this request on the ground that notice of the motion to set aside the staying order was served upon the witness through service upon his attorneys by certified mail on April 30, 1959, thus affording him sufficient time to take any further action he deemed appropriate.

17) In accordance with the order of the United States District Court made on May 11, 1959, the United States Marshal brought the witness Frank DeSimone to the grand jury room at 9:30 A.M., May 12, 1959, at which time the witness again refused to take the oath tendered by the foreman of the special grand jury on the ground that the District Court was without jurisdiction to grant the petition for writ of habeas corpus requiring him to testify before the special grand jury and further that the special grand jury had no jurisdiction insofar as he, Frank DeSimone, was concerned.

18) The foreman of the grand jury then and there directed the witness Frank DeSimone to take the oath whereupon the witness again refused, standing upon the objections that he had previously made.

WHEREFORE, your deponent prays that this Honorable Court enter an order requiring the said Frank DeSimone, the respondent herein, to appear in this Court in person and show cause why he should not be held and adjudged in contempt of this Court in view of his said contemptuous and obstructive conduct and that he be punished by fine or imprisonment at the discretion of the Court as for criminal contempt and for such other and further

order of this Court as may seem proper and just in the premises.

/s/ LLOYD F. DUNN
LLOYD F. DUNN
Special Assistant to the
Attorney General

SUBSCRIBED and SWORN to before me this *14th* day of May, 1959.

JOHN A. CHILDRESS, *Clerk*
U. S. District Court
Southern District of California
By /s/ N. E. BROCKMAN, *Deputy*

POINTS AND AUTHORITIES

All persons within the jurisdiction of the United States have a public duty to appear and give testimony before grand juries when summoned.

Blair v. U. S., 250 U.S. 273, 281

CERTIFICATE OF SERVICE BY MAIL

I, Lauretta M. Filter, state:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is 762 Post Office and Court House, Los Angeles, California; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That on May ~~14~~ 19 lmf, 1959, I deposited in the United States mails in the Post Office at 312 No. Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of ORDER TO SHOW CAUSE IN RE CONTEMPT and AFFIDAVIT addressed to William B. Beirne and G. Vernon Brumbaugh, Attorneys at Law, 139 No. Broadway, Suite 711, Los Angeles 12, California, *their* last known address, at which place there is a delivery service by United States mails from said post office.

This certificate is executed on May ~~14~~ 19 lmf, 1959 at Los (date)
Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ LAURETTA M. FILTER
LAURETTA M. FILTER

(SEAL)

APPENDIX "C."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

U. S. A.
vs.
Frank DeSimone

No. Misc. 297 Civil
MINUTES OF THE COURT
Date: May 22, 1959,
At: Los Angeles, Calif.

PRESENT: Hon. HARRY C. WESTOVER District Judge; Deputy Clerk: E. J. Fisher; Reporter: Arthur J. Hughes

Counsel for Plaintiff: Lloyd F. Dunn, Assistant U. S. Attorney, and Chas. Lynberg and Meyer Newman, Special Attorneys, Dep't of Justice,

Counsel for Defendant: G. Vernon Brumbaugh and Wm. B. Beirne.

PROCEEDINGS: For hearing on order to show cause in re contempt for failure to appear and testify before the Federal Grand Jury.

Attorneys Beirne and Brumbaugh request a continuance of the matter, stating that they do not have sufficient time to prepare and that the order to show cause re contempt was not served upon them in time, pursuant to Local Rule 3, Paragraph J.

Court denies said motion and mentions that the Court of Appeals states that the appeal of the respondent was frivolous, and that the District Court may make exceptions to Rule 3(j).

Attorney Beitne states that counsel is preparing a Petition for Writ of Certiorari to the Supreme Court as to whether or not the District Court has jurisdiction and that if the Supreme Court so decides, there will be no jurisdiction here.

Attorneys for Gov't state they have no objection to a reasonable continuance of this matter to allow counsel for respondent sufficient time to prepare points and authorities, and further state that the Gov't will introduce transcript of various proceedings re respondent before the Grand Jury by reference.

Later, Court orders the matter continued to Friday, May 29, 1959, 11 AM, and states that if Friday is a holiday (Decoration Day, May 30, 1959, Saturday) then the matter will go over to Monday, June 1, 1959, 3 PM.

Court orders that all points and authorities be filed by May 28, 1959.

Filed Memo. of U. S. Attorney re criminal contempt.

(Seal)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By L. A. BROSNAN, *Deputy.*

L. A. BROSNAN

JOHN A. CHILDRESS, *Clerk,*
By E. J. FISHER
E. J. FISHER, *Deputy Clerk.*

HW-5/22/59.

APPENDIX "D."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

U. S. A.
vs.
Frank DeSimone

No. 297 Misc. Civil
MINUTES OF THE COURT
Date: May 29, 1959,
At: Los Angeles, Calif.

PRESENT: Hon. HARRY C. WESTOVER District Judge;
Deputy Clerk; E. J. Fisher; Reporter: S. J. Trainor
Counsel for Plaintiff: Lloyd F. Dunn, Special Assistant to Att'y General;
Counsel for Plaintiff: Chas. A. Lynberg, Meyer, Newman, Pat Coleman, Special Attorneys, Dep't of Justice;
Counsel for Defendant: G. Vernon Brumbaugh and Wm. Beirne.

PROCEEDINGS: For hearing on order to show cause in re contempt for failure to testify before the Federal Grand Jury.

Attorney Dunn makes a statement in opening re marking Gov't exhibits.

Court makes a statement that defendant's memo. re certain questions be taken up first.

Attorney Beirne makes a statement re attention of the Court to his memo.

Attorney Beirne states that defendant's counsel will proceed with a Writ of Certiorari to the Supreme Court

and moves the Court that this matter be continued until the decision of the Supreme Court as to whether or not the Writ will be granted. Court denies said motion.

Gov't Ex. 1 to 5 incl. are marked for ident.

Filed defendant's answer with affidavits of Attorneys Beirne and Brumbaugh, and Defendant DeSimone.

Gov't Ex. 1, 2, and 3 are admitted in evidence over objections of the defendant.

Gov't Ex. 4 and 5 are admitted in evidence. No objections. Exhibit 5 by reference only.

At 11:30 AM Gov't. rests.

Attorney Beirne moves to dismiss order to show cause as it is outside the jurisdiction of this Court. Court denies said motion.

Defendant offers answer and three affidavits into evidence, and same are admitted in evidence as Deft's Ex. A.

Attorney Brumbaugh is sworn and testifies for defendant.

At 11:55 AM defendant rests.

Court makes a statement re defendant coming forward and stating whether or not he will take the oath and testify. Defendant still refuses.

Court advises the defendant that if he fails to appear and be sworn to testify before the Grand Jury he will have to be held in contempt.

At 12:15 PM Court orders cause continued to 2 PM. today. for further hearing. At 2 PM court reconvenes. All present as before.

Defendant now answers yes and that he will appear before the Grand Jury and be sworn to testify.

COURT ORDERS defendant to appear before the Grand Jury July 30, 1959, 9:30 AM, and that cause be held in abeyance and come before Judge Westover at that time.

(Seal)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

JOHN A. CHILDRESS, *Clerk,*
By E. J. FISHER
E. J. FISHER, *Deputy Clerk.*

HW-5/29/59.

APPENDIX "E."

UNITED STATES DEPARTMENT OF JUSTICE
762 Federal Building
Los Angeles 12, California
July 27, 1959

G. Vernon Brumbaugh, Esq.
Attorney at Law
139 North Broadway, Suite 711
Los Angeles 12, California

Re: Frank DeSimone
Grand Jury Appearance

Dear Mr. Brumbaugh:

This is to advise you that it will be unnecessary for Frank DeSimone to appear before the Federal Special Grand Jury on July 30, 1959, as ordered by District Judge Harry C. Westover. This excuse is being given in view of DeSimone's commitments to the Federal District Court for the Southern District of New York in connection with *United States v. Bonanno, et al.*, and further in view of the fact that the grand jury will be in vacation for the remainder of the summer.

When it becomes feasible, a new time will be set for DeSimone's appearance in accordance with the order referred to above and you will be so advised.

Sincerely,

LLOYD F. DUNN
Special Assistant to the
Attorney General
Charles A. Lynberg
By /s/ CHARLES A. LYNBERG
Special Attorney